INDEX

Page

CITATIONS

Cases:

Hester v. *United States*, 265 U. S. 57 3

Johnson v. *United States*, 333 U. S. 10 2

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 125

ANDREW DEGRAZIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was convicted on a three-count indictment charging the unlawful concealment and possession of smoking opium and yen shee, and he was sentenced to imprisonment for a year and a day on each count, the sentences to run concurrently (R. 2-3, 27). On appeal, the judgment was affirmed without opinion (R. 45).

The sole question raised concerns the validity of a search warrant under which the opium and yen shee were seized. The warrant, issued March 6, 1946 (Gov. Ex. 4, R. 32-34), recites that it is based on the affidavit and complaint of George H. White, sworn to before the commissioner (see Gov. Exs. 2 and 3, R. 29-32). White's affidavit recites that on March 5, 1946, he "entered the premises at 1413 23rd Ave., Melrose Park, Illinois, a one family frame building, * * * and from the exterior of the building did detect the fumes of smoking opium" (R. 31). Cf. *Johnson* v. *United States*, 333 U. S. 10, 13. The complaint and warrant, each of which refer to the affidavit, recite merely that White "entered the premises" and detected the fumes. (R. 29-30, 32).

Petitioner's contention appears to be that, since the warrant recites that White had "entered the premises" on March 5, and since White admitted at the hearing on the motion to quash the warrant that he had no warrant on March 5, when he detected the fumes (R. 14), the original entry by White on that date was an illegal search, and, hence, that evidence obtained as the result thereof could not be used to obtain a search warrant. It is evident, however, from White's affidavit, referred to in the warrant, that the "entry" on March 5 was not an entry into the house, but an observation "from the exterior of the building." See also R. 9, 18. Assuming that White was on land owned

by petitioner at the time he made his observations, such an entry on lands outside a building is not an illegal search. As this Court, speaking through Mr. Justice Holmes, said in *Hester* v. *United States*, 265 U. S. 57, 59:

> * * * the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," is not extended to the open fields. The distinction between the latter and the house is as old as the common law.

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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JULY 1948.

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